Supreme Court U. S.
FILED
JAN 12 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976

No. 76-965

PHILLIP PURER,

Plaintiff-Appellant,

vs.

DAVID E. JORDAN, FREDERIC B. TANKEL and ARTHUR TOLL,

Defendants-Appellees.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

WILLIAM J. CURRER, JR.,
707 Wilshire Boulevard, Suite 3281,
Los Angeles, Calif. 90017,
Counsel for Petitioner
Phillip Purer.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

SUBJECT INDEX

Page

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit 1

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit 3

I

Opinions Below 3

II

Jurisdiction 4

III

Questions Presented 4

IV

Statutes Involved 5

V

Statement of Material Facts 6

A. The Decision of the Trial Court 6

B. The Decision of the Court of Appeals 7

C. Brief Statement of Facts 8

D. Contentions of Respondents 11

E. The Contentions of Petitioner 12

VI

Argument in Support of Writ 13

A. A Definitive Opinion by This Court Is Essential in the Securities Field 13

B. The Court of Appeals Has Not Decided This Case 17

Page

C. The Court Refused to Apply California Law 19

VII

Conclusion 20

INDEX TO APPENDICES

Page

Appendix 1. Findings of Fact and Conclusions of Law .....App. p. 1

Appendix 2. Memorandum 19

Appendix 3. Order 25

TABLE OF AUTHORITIES CITED

Cases Page

Barrow, Estate of, 27 Cal. App. 2d 402 (1938) .. 19

Binderun v. Pathe Exchange, 263 U.S. 291, 44 S. Ct. 96 (1923) 4

Burke v. Mission Bay Yacht Sales, 214 Cal. App. 2d 723 19

Campbell v. Degenther, 97 F. Supp. 975 (1951) .. 16

Carlson Etc. v. Banducci, 257 Cal. App. 2d 212 (1967) 19

Cox v. Klatte, 29 Cal. App. 2d 150 (1938) 19

Darwin v. Jess Hickey Oil Corp., 153 F. Supp. 667 (1957) 16

Garfield v. Strain, 320 F. 2d 116 (CCA 10, 1963) 17

Gilligan, Will & Co. v. SEC, 267 F. 2d 461 (CCA 2, 1959) 17

Grant v. U.S. Electronics Corporation, 125 Cal. App. 2d 193 (1953) 19

Katz v. Amos etc., 441 F. 2d 1046 (CCA 2, 1969) 17

Larson v. Tony's Investments Inc., CCH Securities Law Reporter § 92,324 (USDC Ala., 1968) 16

Lively v. Hirschfield, 308 F. Supp. 612 (USDC Colo., 1970) 16

Meier v. Paul X. Smith Corporation, 205 Cal. App. 2d 207 (1962) 19

Quinn etc. v. SEC, 452 F. 2d 943 (CCA 10, 1971) 17

Page

Securities and Exchange Commission v. Ralston Purina Co., 346 U.S. 119, 73 S.Ct. 981, 97 L.Ed. 1494 (1953) 17

Securities and Exchange Commission v. Stephen W. Murphy, Docket Number 76-2299 8

Superintendent Etc. v. Bankers, 92 S.Ct. 165, 404 U.S. 6 (1971) 19

United States v. Abrams, 357 F. 2d 539 (CCA 5, 1966) 16, 17

Valueline Fund v. Marcus, CCH 1964-1966 Decisions ¶ 91,523 (Page 94,969 et seq.) (USDC New York, 1965) 16

Vanderboom v. Sexton, 422 F. 2d 1233 (CCA 8, 1970) 4

Walker v. Phillips, 205 Cal. App. 2d .... (1962) .. 19

Weidner v. Zieglar, 218 Cal. 345 (1933) 19

White v. Kaiser Frazer Corporation, 10 Cal. App. 2d 754 (1950) 19

Regulations

Securities and Exchange Commission Regulations, Reg. 144 14

Securities and Exchange Commission Regulations, Reg. 146 14

Statutes

Civil Code, Sec. 1572 19

Civil Code, Sec. 1642 19

United States Code Annotated, Title 15, Sec. 77d (1)(§ 4(1)) 5

Page

United States Code Annotated, Title 15, Sec. 77b (11) 4

United States Code Annotated, Title 15, Sec. 77b (11)(§ 2(11)) 5, 16

United States Code Annotated, Title 15, Sec. 77d (1) 4

United States Code Annotated, Title 15, Sec. 77e (§ 5) 5

United States Code Annotated, Title 15, Sec. 78j (§ 10b) 4, 6, 12, 18, 19

United States Code Annotated, Title 15, Sec. 78j (§ 101) 5

United States Code Annotated, Title 28, Sec. 1254 (1) 4

United States Code Annotated, Title 28, Sec. 2102 (c) 4

IN THE

Supreme Court of the United States

October Term, 1976
No. .....

PHILLIP PURER,

Plaintiff-Appellant,

vs.

DAVID E. JORDAN, FREDERIC B. TANKEL and ARTHUR TOLL,

Defendants-Appellees.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

The Clerk will enter my appearance as Counsel for the Petitioner.

By WILLIAM J. CURRER, JR.,
Counsel for Petitioner
Phillip Purer.

NOTE: This appearance must be signed by an individual Member of the Bar of the Supreme Court of the United States.

.....

The Clerk is requested to notify counsel of action of the Court by means of Collect Telegram.

IN THE

Supreme Court of the United States

October Term, 1976
No. .....

PHILLIP PURER,

Plaintiff-Appellant,

vs.

DAVID E. JORDAN, FREDERIC B. TANKEL and ARTHUR TOLL,

Defendants-Appellees.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States of America:

The petition of Phillip Purer for writ of certiorari directed to the United States Court of Appeals for the Ninth Circuit to review the judgment of that Court entered September 7, 1976, and a judgment denying petition for rehearing entered November 1, 1976, respectfully shows:

I

Opinions Below.

The decision (no opinion written) of the District Court is attached hereto as Appendix 1. The opinion of the United States Court of Appeals for the Ninth Circuit filed September 7, 1976, is attached hereto

as Appendix 2. Attached hereto as Appendix 3, is the order of the United States Court of Appeals for the Ninth Circuit entered November 1, 1976 denying rehearing after the petition for rehearing and suggestion of appropriateness of rehearing in bank had been timely filed.

II

Jurisdiction.

The judgment of the Court of Appeals was entered September 7, 1976. An order denying petition for rehearing was entered November 1, 1976. The jurisdiction of this Court is invoked under 28 USCA Section 1254 (1) and Section 2102 (c). Jurisdiction in the trial Court was founded on 15 USCA § 78j and the doctrine of pendent jurisdiction.

Vanderboom v. Sexton, 422 F. 2d 1233 (CCA 8, 1970);

Binderun v. Pathe Exchange, 263 U.S. 291, 44 S.Ct. 96 (1923).

III

Questions Presented.

A. How should the provisions of the Securities Act of 1933 [15 USCA § 77d(1)] exempting persons "other than an issuer, underwriter, or dealer." be interpreted.

B. Who is an "underwriter" within the meaning of the Securities Act of 1933.

C. How is the word "distribution" to be interpreted within the meaning of Section 2(11) of the Securities Act of 1933 [15 USCA § 77b(11)].

D. To what extent is there a private placement market under the Securities Act of 1933 and the Securities Exchange Act of 1934.

E. What standards, if any, are the various Courts of Appeals held to in their decisions and opinions.

F. Is a federal court bound to apply the applicable law of the proper state in adjudicating the pendent counts in a case where jurisdiction is founded upon a federal question with pendent counts which are governed solely by state law.

G. Can a Court of Appeals fail to adjudicate the federal questions on which jurisdiction is based where that question was the governing question in the adjudication of the district court.

IV

Statutes Involved.

When referring to the Securities Act of 1933 and the Securities Exchange Act of 1934 we will use the United States Code designation first followed by a section number in parentheses which will be taken to mean either the Securities Act or the Securities Exchange Act. Which is intended can be determined by whether the reference to the United States Code is section 77 [Securities Act] or section 78 [Securities Exchange Act]. The statutes requiring interpretation are:

15 USCA § 77e(§ 5);
15 USCA § 77d(1)(§ 4(1));
15 USCA § 77b(11)(§ 2(11));
15 USCA § 78j(§ 101).

V

Statement of Material Facts.

A. The Decision of the Trial Court.

In this case, petitioner (plaintiff below) counted upon 15 USCA § 78j (§ 10b) in connection with the sale of stock from petitioner Purer to respondents Jordan, Tankel and Toll. Defendants' defense was that the transaction was the nonexempt sale of unregistered securities and the trial court based its decision on that theory. Thus, the conclusions of law [CR III 948-949, Appendix 1] provide:

> "1. Plaintiffs attempt to sell the Purer VTR shares, including the transaction which was the subject matter of this proceeding, was an illegal sale of unregistered securities in violation of Section 5(a) of the Securities Act of 1933, 15 U.S.C. § 77(e) rendering any claim by Plaintiff herein void and unenforceable.
>
> "3. (sic) Plaintiff's attempt to sell the Purer VTR shares including the transaction which is the subject matter of this proceeding was not exempt from the registration provisions of the Securities Act of 1933, Section 4(d)(1), 15 U.S.C. § 77(d)(1) as a transaction by any person other than an issuer, underwriter or dealer.
>
> "4. Plaintiff attempt to sell the Purer VTR shares, including the transaction which is the subject of this proceeding, was a public offering of said VTR shares, and was not exempt from the registration provisions of the Securities Act of 1933, by reason of Section 4(d)(2), 5 U.S.C. § 77(d)(2)."

To arrive at these conclusions, the trial court relied upon findings which in turn were based on evidence which essentially showed that this was merely a sale of certain shares by petitioner Purer (not the issuer) to Messrs. Jordan, Tankel and Toll by means of a local escrow handled by a local escrow holder. In order to arrive at these legal conclusions and the findings of fact it was necessary for the court to determine what constituted a "public offering"; whether the sale was a "public distribution" and whether this so-called "distribution" was in accordance with a plan established by the issuer. These decisions were in turn dependent upon the statutes set out above and the interpretation of those statutes.

B. The Decision of the Court of Appeals.

The Court of Appeals was faced with the proposition that if it were to write an opinion supporting the trial court it would have swept into the jurisdictional arms of the Securities and Exchange Commission and the federal courts every stock transaction in the United States, however small, however large, whether between individuals, merely transferring from one to another a few shares of stock or a large block. In other words, the Court of Appeals was faced with the question of whether or not there is such a thing as a private placement market. Put still another way, the Court was faced with the question of whether the sale of any shares from any person to any other person within the United States is a "public" issue. The trial court had so held. To reach the conclusions the United States District Court for the Central District of California reached, it was necessary for that Court to hold that any transaction involving shares is a public

issue and subject to the provisions of the Act. The extent and magnitude of this holding is evident from the position taken by the Securities and Exchange Commission in a case presently pending before the Ninth Circuit entitled *Securities and Exchange Commission v. Stephen W. Murphy*, Docket Number 76-2299, in which the same district judge in the United States District Court for the Central District of California essentially held in SEC sponsored litigation exactly what he had held in this case, to wit: that there is no private placement market. In spite of the importance of the matter presented to the Ninth Circuit, the Court of Appeals for the Ninth Circuit in this case simply avoided the entire problem by refusing to pass upon the securities law problems presented by the case [Appendix 2]. Instead, the Court of Appeals purported to reach conclusions contrary to the law of California and based on assumptions with respect to the decision of the trial court which the Court of Appeals was unable to make. Thus, it assumed that it could decide to what extent the trial court had relied upon its interpretation of the Securities Act and the Securities Exchange Act in reaching its conclusion. In fact, the Court did not write such a divisible opinion. Had it done so, it could not have reached the conclusion it reached.

C. Brief Statement of Facts.

On or about March 15, 1968, Phillip Purer, Ida Purer and Ronald Purer ("Purers") were the owners of all of the issued and outstanding shares of Ronald Purer, Inc. Petitioner was the chief executive officer [Admitted II CR: 475/15-19].

On March 15, 1968, Ronald Purer, Inc., and the Purers entered into an agreement with VTR whereby

Purers sold all of the issued and outstanding shares of Ronald Purer, Inc., to VTR in exchange for 250,000 shares of VTR. Although the agreement of sale was dated March 15, 1968, it was not performed until November 19, 1968, when the transaction "closed". On November 19, 1968, Purers transferred all of their shares in Ronald Purer, Inc., to VTR and petitioner received for himself and R. Purer and I. Purer 200,000 of the 250,000 VTR shares. In February, 1969, appellant received 50,000 shares, making a total of 250,000 VTR shares [Admitted II CR: 475/23-476/1].

On March 15, 1968, and at all times since, VTR was a corporation, some of whose shares were registered pursuant to the Securities Act of 1933. Some of the shares of VTR during the same period were listed for trading and traded on the American Stock Exchange with the exception that the shares were not traded during the period when trading was suspended. None of the shares issued to petitioner under the agreement of March 15, 1968, as set forth above were registered under the provisions of the Securities Act of 1933 [Admitted II CR: 476/3-13].

Under the agreement between VTR and Purers, VTR was obligated to register 100,000 shares of VTR stock issued to Purers with the Securities and Exchange Commission. On or about July 10, 1969, VTR and Purers entered into an agreement under which Purers agreed that only 50,000 shares of VTR stock owned by them would be included in a July, 1969, registration statement. VTR promised to file an additional registration statement for an additional 50,000 shares of the stock of VTR held by Purers on or before April 30, 1970. The additional registration statement was never filed. In July, 1969, VTR filed a registration

statement with the Securities and Exchange Commission covering 550,000 shares of VTR stock including 50,000 shares of VTR stock issued to the Purers. That registration statement never became effective and was withdrawn by VTR on January 5, 1970, pursuant to a resolution unanimously adopted by the board of directors of VTR at a meeting at which petitioner, who was then a director of VTR, was present [Admitted II CR: 476/15-30].

Prior to March 15, 1968, respondent Jordan introduced petitioner to Frederic Gould, who was then president of VTR. Upon the closing of the transaction between VTR and the Purers, VTR issued to respondent Jordan 5,000 of its shares [Admitted II CR: 477/1-5]. Respondent Jordan helped negotiate the agreement of March 15, 1968, by which Purers obtained 250,000 shares of VTR in exchange for all of the shares of Ronald Purer, Inc. [R: 187/3-17].

On September 8, 1969, petitioner and respondent Jordan entered into an agreement for the sale by petitioner to respondent Jordan of 100,000 shares of VTR stock. This agreement was in the form of escrow instructions to City National Bank in Los Angeles. The instructions and agreement of sale were amended several times. One of the amendments reduced the number of shares to be sold to 50,000 shares and another provided that unless respondent Jordan deposited $75,000 in the escrow not later than 5:00 P.M., November 7, 1969, then and in that event the escrow was to be terminated and the parties relieved of any further obligation [Admitted to CR: 477/7-12].

On November 7, 1969, respondent Jordan assigned his rights under the agreement to respondents Tankel

and Toll to the extent of 40,000 shares [Admitted CR: 477/20-24]. In addition, respondent Jordan designated respondents Tankel and Toll as his nominees in the escrow. After reading all of the papers in the escrow, Messrs. Tankel and Toll deposited the $75,000 required by the agreements within minutes before the deadline of November 7, 1969, at 5:00 P.M. [2 CR: 477/20-29; Tankell R: 159/29-160/17; Toll R: 145/1-13]. Petitioner had no knowledge of this assignment, did not know Messrs. Tankel and Toll and, on the contrary, this transaction was strictly a private one between Mr. Jordan and Messrs. Tankel and Toll.

The agreements between petitioner Purer and respondent Jordan specifically provided that the assignees of a party would be bound on the original agreement. Because of the provisions of the agreement, the effect of the assignment from respondent Jordan to respondents Tankel and Toll was to add two buyers to the purchase agreement [Joint Exhibit 2].

Petitioner deposited the shares required by the sales agreement in the escrow but respondents except for the $75,000 which they were required to deposit in order to prevent the agreement being terminated, refused to deposit the balance of the price. When the market price of the shares dropped below the agreed price, about six months later, respondents then sought to avoid the agreement and recover their $75,000 back. Petitioner commenced an action to enforce the agreement.

D. Contentions of Respondents.

In order to shorten this recitation of the facts and background of this case, we will set out the contentions here of the respondents because that really indicates more than anything else the position of the respondents

and the trial court. Essentially the respondents simply argued that the shares were unregistered and that therefore the agreements were void and that they should be entitled to recover the $75,000 deposit or option price however it may be viewed and escape without any liability at all. The trial court adopted this theory which, of course, points up the necessity of deciding and the meaning of the statutory provisions involved. In addition, the Court of Appeals attempted to justify their refusal to consider the securities law findings of the trial court by claiming that the contracts were not enforceable. In that respect, however, the trial court had failed to make appropriate findings and the Court of Appeals simply ignored California law. By simply ignoring California law the failure to find of the trial court and refusing to consider the facts as they appear in the record, the Court of Appeals simply failed to decide this case. The inconsistency of both courts is demonstrated by the fact that even though there was a finding and conclusion that the agreement were void and unenforceable nevertheless the trial Court enforced the agreements to the extent of allowing fees to respondent Jordan and the Court of Appeals affirmed.

E. The Contentions of Petitioner.

From the beginning, the petitioner took the position that there was a violation of 15 USCA § 78j, § 10b for the reason that without the knowledge of petitioner, respondents were not able to perform in the first place so that all of the respondents had entered into this contract without any intention of performing. This is fraud as a matter of law in California. Although the 10b arguments were ignored by both trial and

appellate courts, the fact is that the 10b violation is there and any fair reading of the transcript of the clerk and the reporter will demonstrate that fact. In addition, the petitioner has contended all along that he did perform the contract and that since the respondents not only had never performed but in addition the respondents had no intention of performing there was no way that the court could make any decision in favor of the respondents particularly for attorneys' fees since any determination favorable to respondents would first require a finding that respondents did and performed all promises and conditions on their part to be performed before there could be any obligation upon the part of respondents. Thus we say that both the trial court and the appellate court have failed to decide this case and to the extent that there is a decision they have consciously refused to follow California law which we believe to be a violation of the principles laid down by this Court.

VI

Argument in Support of Writ.

A. A Definitive Opinion by This Court Is Essential in the Securities Field.

One of the major problems in the securities industry and even with respect to private individuals is the question of what is a public issue. It is almost impossible to advise clients concerning the differential between a private issue or private placement and a public issue. The circuit courts and the district courts both have developed varying standards, some of which require a determination of the subjective intent of the buyer. This requires an impossible burden of proof on the part of a seller of securities and expands the

jurisdiction of the Securities and Exchange Commission beyond anything intended by Congress. This case is an extreme example of a United States District Court in effect determining that the Securities and Exchange Commission has jurisdiction over private sales of securities between two individuals both of them businessmen and both of them well acquainted with the securities market. The buyer assigned to two lawyers, to wit: Messrs. Tankel and Toll who also were engaged in practice in the securities field. To say that this is an issue which was a public issue or transfer in violation of the Securities Act is something which most businessmen and securities dealers would not even suspect until as here there was an attempt to enforce the agreement, then the district court relied upon the subjective intent or purpose of the buyers to the exclusion of the seller and held that this was a public issue and therefore a violation of the securities law. In effect, plaintiff Purer was simply trapped since no reasonable man would suspect such a determination. The Securities and Exchange Commission has fostered this kind of thinking with respect to the securities laws since this gives the Securities and Exchange Commission ever broadening ever widening jurisdiction which it may or may not assert depending on what it chooses to consider at the moment constitutes a public issue or private placement. An examination of SEC regulations such as Regulation 146 and Regulation 144 demonstrates that the SEC considers that it has jurisdiction except in those instances where the person "does not require the protection of the Act". But in the interpretation and decision making concerning what action is to be filed and what action is not to be filed, the SEC and many district courts simply rely

upon an impossible proof question, to wit: what was the subjective state of mind of the buyer. In view of this, it is not surprising to find that the cases vary from time to time in the same district and even in the same circuit. Different circuits do not necessarily agree and the entire field of private placement vs. public issue is an impossible no man's land. In an effort to overcome and to meet the subjective test imposed by cases such as this one and cases in which the SEC is a party, and since the SEC notoriously is slow and unable to handle the jurisdiction it already has acquired, private placements are sought in which the documents become ever longer and ever more incomprehensible. Some private placement memoranda are hundreds of pages long with a requirement by the issuer that the buyer must sign a document which states that he has read the entire memorandum and understands every word of it which, of course, is nonsense. Surely there must be some way that the statutes true intent, tenor and purpose can be announced and stated definitively by this Court. We ask that this Court grant the petition for certiorari in order that we may argue in extenso the problems involved. To another vice in the present situation is that the Securities and Exchange Commission can be completely arbitrary and capricious in determining what case to prosecute and what case to ignore, since it is held to no definite statutory standard. To a petition such as this we can only give the court a brief indication of the importance of the question and the problems involved. It is then up to this Court whether or not it wishes to take this case as a vehicle for determining the proper interpretation of the statutes involved.

The problem here presented is who is an underwriter. An underwriter is not exempt but an underwriter is only one who buys with a view to "distribution" of the securities. Thus, if the "underwriter" buys from an issue with intent to distribute and the intent is formulated at the time of the purchase, the later sale by the underwriter is not exempt. The real purpose of this is simply to prevent an issuer from evading the law. We have no quarrel with this. But if the person purchasing from the issuer merely engages in another private sale which is also exempt, it would seem that there is no point in attempting to fasten the liability of the issuer on a person who has merely engaged in another private placement. Some cases recognize this proposition and interpret the word "distribution" to mean "public distribution" in connection with 15 USCA § 77b(11), § 2(11).

Some of the cases which have attempted to interpret the statutes on this subject follow:

United States v. Abrams, 357 F. 2d 539 (CCA 5, 1966);

Lively v. Hirschfield, 308 F. Supp. 612 (USDC Colo., 1970);

Valueline Fund v. Marcus, CCH 1964-1966 Decisions ¶ 91,523 (Page 94,969 et seq.) (USDC New York, 1965);

Campbell v. Degenther, 97 F. Supp. 975 (1951);

Larson v. Tony's Investments Inc., CCH Securities Law Reporter § 92,324 (USDC Ala., 1968);

Darwin v. Jess Hickey Oil Corp., 153 F. Supp. 667 (1957);

Garfield v. Strain, 320 F. 2d 116 (CCA 10, 1963);

Securities and Exchange Commission v. Ralston Purina Co., 346 U.S. 119, 73 S.Ct. 981, 97 L.Ed. 1494 (1953).

Even these cases talk about one having the ability to "fend for himself" whatever that may really mean and in addition they talk about access to information. Again, if the standard of information available is the same as that of a registration statement particularly an S1 which is the argument usually made by parties attempting to claim unregistered shares or public issue, then there is no point in the entire private placement market since it requires an S1 anyway. We suggest that a rationalziation and complete dissertation by this Court is essential to bring order out of chaos in the private placement vs. public issue field of securities.

Against the above cases are the following:

Quinn etc. v. SEC, 452 F. 2d 943 (CCA 10, 1971);

Gilligan, Will & Co. v. SEC, 267 F. 2d 461 (CCA 2, 1959);

United States v. Abrams, 357 F. 2d 539 (CCA 2, 1966);

Katz v. Amos etc., 441 F. 2d 1046 (CCA 2, 1969).

B. The Court of Appeals Has Not Decided This Case.

In recent years the Courts of Appeals, particularly for the Ninth Circuit, has fallen into the habit of writing the kind of cryptic opinions which we find here. They have literally refused to follow any standard in writing opinions which would be meaningful and

which would decide the case. Here it is evident that there should be an interpretation of the statute and a determination that the trial court erred in holding that the contracts here involved were void because they violated the public issue vs. private placement provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934. In order to avoid the probability that this Court might reverse the Court of Appeals simply refused to decide the case at all and so stated. In the statement, however, it refused to consider whether or not there was a violation on the part of the respondents of 15 USCA § 78j (§ 10b). Thus, the court refused to determine whether or not there had been a fraud on the part of the defendants and it refused to determine whether or not this was a private placement or a public issue. Two essential issues are raised by the parties in this action. We suggest to this Court that there should be some standard set down by this Court of conduct to be met by the Courts of Appeals. The Federal Rules of Civil Procedure require adequate decisions by the district courts, there is no reason why this Court should not require adequate decisions by the Courts of Appeals for the various circuits. This is a matter we would like to brief in *extenso* for this Court and a matter which should be reviewed with considerable care. We note that the Court of Appeals not only refused to decide the case but it refused to permit its opinion to be published. The refusal to permit this kind of an opinion to be published is quite understandable. The opinion itself reveals that the case was not decided as it should have been and what law is mentioned is a total violation of California law.

On this ground alone the petition should be granted.

C. The Court Refused to Apply California Law.

Apparently the court recognized that it could not follow California law without reversing the trial court. It therefore has written a very brief and inadequate statement concerning California law. The truth is that on the ground of fraud alone, the court should have decided this case in favor of plaintiff. Since under California law there is no question but that entry into a contract with no intention to perform is fraud. The balance of the dissertation by the Court of Appeals is completely immaterial. It happens that that also is a violation of 15 USCA § 78j, § 10b. The obligation of the Court of Appeals to determine this case in favor of petitioner under California law is demonstrated by the following authorities:

Section 1642, Civil Code;

Meier v. Paul X. Smith Corporation, 205 Cal. App. 2d 207 (1962);

Carlson Etc. v. Banducci, 257 Cal. App. 2d 212 (1967);

White v. Kaiser Frazer Corporation, 1-0 Cal. App. 2d 754 (1950);

Walker v. Phillips, 205 Cal. App. 2d (1962);

Weidner v. Zieglar, 218 Cal. 345 (1933);

15 USCA § 78j, § 10b;

Superintendent Etc. v. Bankers, 92 S.Ct. 165, 404 U.S. 6 (1971);

1572 Civil Code;

Burke v. Mission Bay Yacht Sales, 214 Cal. App. 2d 723;

Estate of Barrow, 27 Cal. App. 2d 402 (1938);

Cox v. Klatte, 29 Cal. App. 2d 150 (1938);

Grant v. U.S. Electronics Corporation, 125 Cal. App. 2d 193 (1953).

Because the court refused to follow the law of California and also refused to determine the securities issue, there should be a determination concerning the pendent jurisdiction problem. If the federal court is not even going to decide a question of federal jurisdiction, then how can it possibly continue to determine the pendent issues? It would seem that under these circumstances, pendent jurisdiction was lost.

VII

Conclusion.

In conclusion we urge the Court that the issues we have stated require determinations by this Court and suggest that the Court issue its writ of certioriari to the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

By WILLIAM J. CURRER, JR.,
Counsel for Petitioner
Phillip Parer.

APPENDIX 1.

Findings of Fact and Conclusions of Law.

United States District Court, Central District of California.

Philip Purer, Plaintiff, vs. David E. Jordan, Frederic B. Tankel and Arthur Toll, Defendants. No. 70-511-LTL.

Filed: November 30, 1973.

FINDINGS OF FACT

1. Plaintiff's First Cause of Action arises under the Securities Exchange Act of 1934, the Second Counterclaim of Defendants Tankel and Toll arises under the Securities Act of 1933 and the Third Counterclaim of Defendants Tankel and Toll arises under the Securities Exchange Act of 1934 and all other claims and counterclaims are pendent to the federal claims herein. The Court has subject matter jurisdiction of this action and personal jurisdiction over plaintiff and defendants Jordan, Tankel and Toll.

2. On March 15, 1968, plaintiff, his son, Ronald Purer and his mother, Ida Purer, (hereinafter jointly referred to as "Purers") were the owners of all the outstanding stock of Ronald Purer, Inc. Plaintiff was the chief executive officer of Ronald Purer, Inc. The audited statement of Ronald Purer, Inc. shows net income before taxes for the year ending March 31, 1968 of $283,914 and after income taxes of $154,135.

3. On March 15, 1968, Ronald Purer, Inc. and the Purers entered into an agreement, Defendants' Exhibits "A" and "B", with VTR, Inc. (hereinafter VTR) under which the Purers were to acquire a minimum

of 200,000 shares of VTR common stock in exchange for all of the outstanding stock of Ronald Purer, Inc. Pursuant to said agreement, a total of 250,000 shares of VTR stock was issued to the plaintiff, of which 100,000 shares was the property of Plaintiff, 100,000 shares the property of Ronald Purer and 50,000 shares the property of Ida Purer. The closing of the transaction took place on November 19, 1968. Plaintiff received 200,000 of the 250,000 shares at closing and 50,000 in February, 1969. At all times hereafter, Plaintiff, his mother and son are referred to jointly as the "Purers" and the 250,000 shares of VTR stock issued to them is referred to as the "Purer shares".

4. On March 15, 1968, and at all times since, VTR was a corporation some of whose stock was registered pursuant to the Securities Exchange Act of 1933. None of the stock issued to Plaintiff was ever registered pursuant to the provisions of the 1933 Act of qualified under the provisions of Section 25111, 25112, or 25113 of the California Corporations Code.

5. On March 15, 1968, and at all times to April 17, 1970, some of the shares of VTR were listed for trading on the American Stock Exchange and were traded on said Exchange except for periods when trading was suspended.

6. Under the VTR-Purers agreement, Defendants' Exhibits "A" and "B", VTR was obligated to register 100,000 shares of the Purers' stock with the Securities and Exchange Commission. On or about July 10, 1969, VTR and the Purers entered into an agreement, Defendants' Exhibit "C" under which the Purers agreed that only 50,000 shares owned by them would be included in a July, 1969 registration statement and VTR

promised to file an additional registration statement for another 50,000 shares of the Purers by April 30, 1970. That additional registration statement was never filed. In July, 1969, VTR filed a registration statement with said Commission covering 550,000 shares of VTR stock, including 50,000 shares of the Purers. That registration statement never became effective and was withdrawn by VTR on January 5, 1970, pursuant to a resolution unanimously adopted by its Board of Directors, a meeting at which Plaintiff, a Director of VTR, was present.

7. Prior to March 15, 1968, defendant Jordan introduced Plaintiff to Fredric Gould, President of VTR, and as a result of the closing of the Plaintiff-VTR transaction referred to in paragraph 3, Jordan received 5,000 shares of VTR stock from VTR.

8. On or about September 8, 1969, Plaintiff and Defendant Jordan entered into Joint Exhibit 1, under which an escrow, No. 7002-HC, was established in the City National Bank. Said document was thereafter amended by Plaintiff and Defendant Jordan by Joint Exhibits 2, 3, and 4 executed respectively on or about September 12, 1969, October 14, 1969, and October 30, 1969.

9. Pursuant to Joint Exhibit 1, Plaintiff deposited in escrow two certificates of VTR shares, Joint Exhibits 5 and 14, for 50,001 and 74,999 shares, respectively. Subsequently, by agreement of the parties, the certificate for 74,999 shares was returned to Plaintiff.

10. On November 7, 1969, Defendant Jordan and Defendants Tankel and Toll entered into an agreement, Joint Exhibit 8. Pursuant to said agreement, Defendants Tankel and Toll provided $75,000 which was deposited

into the escrow account on November 7, 1969. Joint Exhibit 7 is a receipt for said $75,000 deposit.

11. On November 7, 1969, Joint Exhibit 6 was delivered to the escrow agent, under which Defendant Jordan designated Defendants Tankel and Toll his nominees in the escrow "as to 40,000 shares of VTR, Inc. only".

12. On November 6, 1969, at a public press conference in Washington, D.C., Allan Ginsburg, A Vice President and Director of VTR, made statements concerning the business affairs of VTR describing the business activities of VTR and its subsidiaries, which statements were more favorable to the business prospects of VTR than were warranted by the true facts. These untrue statements included statements that Prestige Structures, Inc., a subsidiary of VTR, planned to build 70 modular homes per week or one per hour, that Prestige planned to build or acquire six additional plants over the next two years, that the capacity of the only existing plant of Prestige had been sold out through all of 1970 and that as of November 6, 1969, Prestige had produced 125 units. The true facts were that on November 6, 1969, Prestige did not have the capability of producing 70 modular homes per week and had no assurance such production capability could be attained, that Prestige had entered into no firm commitments to construct any other facility, that Prestige had at that date made no sales and had no building sales contracts and that Prestige at that date had produced approximately 40 units or 20 prototype houses which were not for sale but were being used for exhibition to prospective customers.

13. Defendants' Exhibits "H" and "I" are press releases issued by VTR on November 7, 1969 and Decem-

ber 18, 1969, respectively, as a result of the statements of Allan Ginsburg set forth in paragraph 12.

14. As a result of the statements of Allan Ginsburg set forth in Paragraph 12, trading in shares of VTR was suspended on the American Stock Exchange on November 11, 1969 and did not resume again until December 22, 1969. The Securities and Exchange Commission also filed suit against VTR, which suit was settled by VTR before December 22, 1969.

15. On January 5, 1970, Defendants Tankel and Toll wrote a letter to Defendant Jordan, Joint Exhibit 15, requesting a call from Jordan to discuss the situation concerning the transaction with Plaintiff.

16. On January 5, 1970, VTR withdrew its pending registration statement for 550,000 shares. On January 6, 1970, an article appeared in the Wall Street Journal, Joint Exhibit 16, in which it was stated that VTR would withdraw its then pending registration statement for 550,000 shares and planned to merge with a company entitled Pacific Coast Properties, Inc.

17. On February 20, 1970, Plaintiff, by his attorney, sent a letter, Joint Exhibit 9, to Defendants Jordan, Tankel and Toll, and others, demanding the completion of the escrow and the deposit therein of the sum of $450,000.

18. On April 9, 1970, defendants Tankel and Toll wrote a letter to Defendant Jordan, Joint Exhibit 10, in which they notified Jordan that they elected to terminate their agreement with Jordan dated November 7, 1969 (Joint Exhibit 8).

19. On April 15, 1970, Defendants Tankel and Toll wrote Joint Exhibit 11 on behalf of themselves

and Defendant Jordan to the escrow officer of the City National Bank stating that they elected to terminate the escrow and requesting return of the $75,000 deposited therein because of the cancellation of the registration of VTR stock referred to in Joint Exhibit 4.

20. On April 16, Plaintiff, by his attorney, wrote Joint Exhibit 12 to the escrow officer of the City National Bank objecting to the termination of the escrow and the return to Defendants Tankel and Toll of the $75,000 therein.

21. On April 17, 1969, the escrow officer sent to the parties hereto Joint Exhibit 12 which are escrow instructions to terminate the escrow. Plaintiff refused to sign said instructions and the escrow agent declined to terminate the escrow.

22. On or about May 19, 1970 and August 27, 1970, respectively, the parties hereto executed Joint Exhibits 12 and 13. As a result thereof, on or about August 27, 1970, a certificate for 74,999 shares of VTR was released from escrow and returned to Plaintiff and the $75,000 in escrow was paid jointly to Willard Horwich, attorney for Plaintiff, and Defendant Tankel, to be held by them until the termination of this action. It is agreed by the parties that disposition of said $75,000 shall be in accordance with the order of this Court.

23. Between September 8, 1969 and April 17, 1970, Plaintiff did not file with the Securities and Exchange Commission any notice or report that he had sold any shares of VTR stock.

24. Beginning in June of 1969, and continuing throughout the remainder of the year 1969, Plaintiff made use of the mails, telephones and the facilities

of national stock brokerage firms F.I. Dupont, Glore, Forgan & Co. and Robert Scott and Co. to offer for sale shares of stock owned by the Purers. Plaintiff offered the Purer shares for sale through at least five individual securities brokers, James Brewer, Ted Call, Jack Wolfe, Christopher Cole and Van Williams. Plaintiff further offered to sell the Purer shares to Defendant Jordan and to other persons unknown to Plaintiff who Defendant Jordan might interest in buying such shares, and the transaction between Plaintiff and Defendant Jordan embodied in Joint Exhibits 1, 2, 3 and 4 and the involvement of Defendants Tankel and Toll in said transaction resulted from such offer of sale of VTR shares by Plaintiff.

25. Under the agreement by which the Purers acquired their VTR shares, Purers were entitled to immediately sell 100,000 of the 250,000 shares acquired by them without registration under the Securities Act of 1933 and VTR agreed to register under the Securities Act an additional 100,000 shares of Purer shares at VTR's expense. The 100,000 shares which the Purers were authorized to sell without registration were required by their agreement with VTR to be sold privately and not publicly. Such a private sale could only be effected upon an opinion of a New York law firm, Goldfeld, Charak, Tolins and Lowenfels that such sale was exempt from registration under the Securities Act of 1933. Said law firm had represented the Purers in their acquisition of VTR shares. The Purers never received any such opinion from said law firm that the transaction in which the Defendants herein are involved or any other offer to sell VTR stock by Plaintiff was exempt from registration.

26. Plaintiff individually was the owner of 100,000 shares of VTR stock, all of which Plaintiff offered for sale in his transaction with Defendant Jordan. Had such sale been completed under its original terms (Joint Exhibit 1) Plaintiff would have disposed of all of the VTR stock owned by him personally.

27. Between September 8, 1969 and November 11, 1969, the price of VTR shares traded on the American Stock Exchange rose from fourteen dollars per share to a high of thirty dollars per share. Trading on the American Stock Exchange in VTR was suspended from November 11, 1969 through December 21, 1969. On December 22, 1969 when trading resumed, VTR stock closed at seventeen and five-eighths and never again exceeded twenty dollars per share.

28. Plaintiff purchased his VTR shares from the issuer thereof, VTR, with a view to the distribution thereof. The Purers purchased their VTR shares from the issuer thereof, VTR, with a view to the distribution thereof. Plaintiff was attempting to dispose of a total of 200,000 shares of VTR owned by the Purers, 100,000 of which were shares involved in Plaintiff's transaction with Defendant Jordan which is the subject matter of this proceeding.

29. The shares of VTR which plaintiff was offering for sale, including the shares involved in the transaction between Plaintiff and Defendant Jordan which is the subject matter of this proceeding were not registered for sale under the provisions of the Securities Act of 1933.

30. Defendants did not have information about VTR or its business or financial affairs substantially the equivalent of that information which would have

been disclosed by a registration statement and prospectus filed pursuant to the registration provisions of the Securities Act of 1933 and the regulations promulgated thereunder.

31. Plaintiff offered to sell his VTR shares to persons unknown to Plaintiff without regard to whether such persons had knowledge of VTR, or its business or financial affairs substantially the equivalent of that information which would have been disclosed by a registration statement and prospectus filed pursuant to the Securities Act of 1933 and the regulations promulgated thereunder.

32. At the time of the agreement between Plaintiff and Defendant Jordan for the disposition of Plaintiff's stock herein (Joint Exhibit 1) Plaintiff knew that Defendant Jordan was not acting solely on Jordan's own account but would attempt to obtain other persons, unknown to Plaintiff, to purchase Plaintiff's VTR stock.

33. It was the intention of Plaintiff and Defendant Jordan that the transaction involved in this proceeding, embodied in Joint Exhibits 1, 2, 3 and 4, created an option on the part of Jordan or his nominees to purchase VTR shares from Plaintiff and that the failure of Jordan or his nominees to purchase any or all of the VTR shares shall be without liability, except that Jordan shall bear the costs of escrow.

34. Plaintiff did not perform each and every promise, obligation and condition on his part to be performed under his agreement with Defendant Jordan embodied in Joint Exhibits 1, 2, 3 and 4 in that:

(a) Plaintiff did not deposit into the escrow an instrument executed by the President of VTR and/or Chairman of the Board of VTR acknowledging VTR's

awareness that Plaintiff was selling shares of VTR to Defendant Jordan, as required in Joint Exhibit 1;

(b) Plaintiff's representation that the VTR stock which was the subject matter of the transaction was freely transferable subject only to an investment letter (Joint Exhibits 1 and 2) was false and the stock was not so transferable in that:

(i) the stock certificate for 50,001 shares of VTR (Joint Exhibit 5) which Plaintiff deposited into escrow provided that "the shares have been acquired for investment and not with a view to, or for sale in connection with any distribution thereof within the meaning of the Securities Act of 1933 as amended and the rules and regulations of the Securities and Exchange Commission and may not be sold or transferred except in compliance with the Securities Act of 1933". The attempted disposition of Plaintiff's stock under Joint Exhibits 1, 2, 3 and 4 was not in compliance with the Securities Act of 1933.

(ii) under Plaintiff's agreement with VTR, Plaintiff could not sell any of his VTR stock unless it was registered pursuant to the Securities Act of 1933 or unless the Plaintiff received an opinion from the law firm of Goldfeld, Charak, Tolins and Lowenfels that the sale of VTR stock by Plaintiff was exempt from registration under the Securities Act of 1933. Plaintiff did not receive such an opinion from Goldfeld, Charak, Tolins and Lowenfels and Plaintiff's VTR stock was never registered under the provisions of the Securities Act of 1933.

(c) The condition of the escrow that the closing take place ten days following the date that "the current registration of 550,000 shares of VTR stock now pending becomes effective" was never met because said registration never became effective.

35. It was the intention of the parties to Joint Exhibits 1, 2, 3 and 4 that the escrow established therein would close only if the then pending registration of 550,000 shares of VTR stock became effective.

36. It was not impossible for the pending registration of 550,000 shares of VTR stock to become effective. The registration statement was withdrawn by the voluntary decision of the Board of Directors of VTR on January 5, 1970, pursuant to a resolution unanimously adopted at a meeting at which Plaintiff, a Director of VTR, was present.

37. Plaintiff did not enter into any agreement directly or indirectly with Defendants Tankel and Toll.

38. It was not the intention of Defendants Jordan, Tankel and Toll that Defendants Tankel and Toll become a party to Defendant Jordan's agreement with Plaintiff (Joint Exhibits 1, 2, 3 and 4) or become under any obligation to Plaintiff by reason of the deposit of $75,000 into the escrow, the agreement between Defendant Jordan and Defendants Tankel and Toll (Joint Exhibit 8), the designation by Defendant Jordan of Defendants Tankel and Toll as his nominee for 40,000 shares of VTR (Joint Exhibit 6) or otherwise.

39. At the time defendants Tankel and Toll became involved in the transaction which is the subject of this proceeding, they believed they had an option to purchase shares of VTR stock and did not believe they were obligated to purchase any shares of VTR stock from Plaintiff.

40. It was the belief of all Defendants in connection with the transaction which is the subject of this proceeding that failure of any of them to purchase VTR shares from Plaintiff was without liability except for costs of escrow and that it was a condition of the transaction that a closing would take place only after the then pending registration of 550,000 shares of VTR became effective.

41. No defendant made any false statements to Plaintiff or engaged in any device, scheme or artifice to defraud or deceive the Plaintiff.

42. Defendants Tankel and Toll never stated to Plaintiff that they intended to purchase any of his shares of VTR. The first telephone conversation between Plaintiff and either Defendant Tankel or Defendant Toll occurred on or about December 22, 1969, the date trading in VTR stock resumed after being suspended since November 11, 1969. Approximately five to eight telephone conversations took place between Plaintiff and Defendants Tankel or Toll between December 22, 1969 and the early part of February 1970. In the first of these conversations in December, 1969, said Defendants told Plaintiff they had not decided whether they would exercise their rights under their agreement with Defendant Jordan to obtain some of Plaintiff's VTR stock. After the withdrawal of the VTR registration on January 5, 1970, said Defendants told Plaintiff they would not purchase his VTR shares but that their transaction was only with Defendant Jordan and Defendants Tankel and Toll could not themselves release the escrow or terminate the transaction because Plaintiff's agreement was with Defendant Jordan. There is no evidence that Plaintiff

contacted or attempted to contact Defendant Jordan during January or February, 1969.

43. Plaintiff on several occasions told Defendants Tankel and Toll that they need not proceed with the transaction. It was not until February, 1970, when the price of VTR on the American Stock Exchange went below fifteen dollars per share that Plaintiff first demanded that Defendants proceed to close the escrow and first asserted that Defendants were obligated to proceed. Thereafter, there were no further conversations between Plaintiff and Defendants Tankel and Toll.

44. After receipt by Defendants of a letter from Plaintiff's attorney (Joint Exhibit 9) demanding that Defendants close the escrow, Defendant Tankel advised Plaintiff's attorney, Willard Horwich that Defendants Tankel and Toll were not obligated to purchase any stock from Plaintiff and would not close the escrow. Tankel and Toll thereafter terminated their agreement with Jordan (Joint Exhibit 10). Thereafter, all three Defendants gave notice to terminate the escrow and return Plaintiff's stock to Plaintiff and the $75,000 to Defendants Tankel and Toll (Joint Exhibit 11).

45. But for the objections of Plaintiff, the escrow agent, City National Bank, would have terminated the escrow on or about April 20, 1970 and returned the $75,000 therein to Defendants Tankel and Toll and the shares of VTR stock therein to Plaintiff.

46. Defendants Tankel and Toll borrowed the $75,000 deposited in escrow at an interest cost of ten per cent per annum. By reason of the refusal of Plaintiff to consent to a termination of the escrow on April 20, 1970, Defendants Tankel and Toll incurred interest costs on the $75,000 deposited in escrow be-

tween April 20, 1970 and March 31, 1973, a period of 2 years, 11 2/3 months, in the amount of $22,084.

47. Pursuant to agreement between the parties to this litigation, the $75,000 deposited into escrow was transferred to an interest bearing account in August 1970 and to March 31, 1973 had earned interest in the amount of $9,210.03.

48. By reason of the refusal of Plaintiff to consent to the termination of escrow, Defendants Tankel and Toll suffered a net loss of $12,873.97 and continue to suffer additional loss measured by the difference between interest incurred by them of 10 per cent per annum on $75,000 and the interest actually earned on the $75,000 which was deposited into escrow.

49. Between September 8, 1969 and April 17, 1970, VTR shares were selling on the American Stock Exchange at prices in excess of the true value thereof.

50. Plaintiff, a Director and substantial stockholder of VTR, should reasonably have known:

(a) that the shares of VTR were selling above their true value;

(b) information relating to the business affairs and financial condition of VTR was not available to persons other than insiders in VTR during the period September 8, 1969 to April 17, 1970;

(c) that VTR was in weak and unstable condition, that Ronald Purer, Inc. was the only subsidiary of VTR which provided VTR with a substantial and usable net operating income, that the financial statements of VTR were inaccurate, underestimating liability and overstating the value of assets.

51. Plaintiff never advised any Defendant as to facts relating to the business affairs, financial conditions and price of stock set forth in the preceding paragraph, nor did Plaintiff give any Defendants any other information concerning the business affairs of VTR.

52. Defendants would not have become involved in the transaction which is the subject matter of this proceeding if they had known the true facts concerning the business affairs, financial condition of VTR and the market price of VTR stock.

CONCLUSIONS OF LAW

1. Plaintiff's attempt to sell the Purer VTR shares, including the transaction which was the subject matter of this proceeding, was an illegal sale of unregistered securities in violation of Section 5(a) of the Securities Act of 1933, 15 U.S.C. § 77(e) rendering any claim by Plaintiff herein void and unenforceable.

3. Plaintiff's attempt to sell the Purer VTR shares including the transaction which is the subject matter of this proceeding was not exempt from the registration provisions of the Securities Act of 1933, Section 4(d)(1), 15 U.S.C. § 77(d)(1) as a transaction by any person other than an issuer, underwriter or dealer.

4. Plaintiff's attempt to sell the Purer VTR shares, including the transaction which is the subject of this proceeding, was a public offering of said VTR shares, and was not exempt from the registration provisions of the Securities Act of 1933, by reason of Section 4(d)(2), 15 U.S.C. § 77(d)(2).

5. Plaintiff's attempt to sell the Purer VTR shares, including the transaction which was the subject of

this proceeding, was an illegal sale of unqualified securities in violation of Sections 25110 and 25130 of the California Corporations Code rendering any claim by Plaintiff herein void and unenforceable.

6. Plaintiff's attempt to sell the Purer VTR shares, including the transaction which was the subject of this proceeding, was not exempt from the qualifications requirement of the California Corporations Code by reason of Section 25104 thereof because the offers and sale were effected through broker dealers in a public offering.

7. The agreement between Plaintiff and Defendant Jordan (Joint Exhibits 1, 2, 3 and 4) and the deposit of $75,000 into escrow pursuant thereto gave Jordan and his nominees, Defendants Tankel and Toll, an option to purchase 50,000 VTR shares from Plaintiff but did not create any obligation on the part of any Defendant to complete the escrow. The failure of Defendants to purchase any or all of Plaintiff's VTR shares was without liability on the part of Defendants to the Plaintiff.

8. Plaintiff failed to perform all obligations on his part to be performed necessary to closing of the escrow.

9. The closing of the escrow and the completion of any sale of Plaintiff's VTR stock to Defendants was conditioned upon the happening of a condition which never occurred, namely the becoming effective of the then pending registration statement of VTR stock. Such condition was material to the entire transaction and its failure relieved defendants of any obligation they may otherwise have had to complete any purchase of VTR stock from Plaintiff.

10. The failure of the condition of the effectiveness of the registration of VTR shares was not excused by the doctrine of impossibility.

11. Defendants Tankel and Toll were under no direct contractual obligation to Plaintiff.

12. Neither the agreement between Plaintiff and Defendant Jordan (Joint Exhibits 1, 2, 3 and 4), nor the Agreement between Defendant Jordan and Defendants Tankel and Toll (Joint Exhibit 8), nor the deposit of $75,000 into escrow, nor the designation by Defendant Jordan of Defendants Tankel and Toll as Jordan's nominee, nor any combination thereof, created any contractual obligation on the part of Defendants Tankel and Toll to Plaintiff.

13. None of the Defendants herein breached any agreement with Plaintiff pursuant to which any defendant was obligated to purchase VTR shares from Plaintiff.

14. Plaintiff is not entitled to recover the contract price for VTR shares or damages for breach of contract from Defendants.

15. None of the Defendants herein violated Rule 10b-5 of the Securities and Exchange Commission.

16. Plaintiff violated Rule 10b-5 of the Securities and Exchange Commission. Plaintiff, as a director and substantial stockholder of VTR was an insider and was under a duty to make reasonable inquiries into the affairs of VTR when offering to sell securities in VTR and to reveal to his offerees the true financial condition of VTR and other pertinent information available to an insider but not to other persons. Plaintiff failed to disclose to defendants information concerning

the true financial condition of VTR and that the market price of VTR shares on the American Stock Exchange was in excess of the true value thereof, information which a reasonable inquiry by plaintiff should have revealed and which plaintiff should reasonably have known.

17. The $75,000 held jointly by Willard Horwich and defendant Tankel, as Trustees, subject to the order of this Court, together with all interest earned or accrued thereon, shall be paid to the defendants Tankel and Toll.

18. Plaintiff wrongfully and without authority objected to the release from escrow of the $75,000 deposited therein and thereby prevented the return of said funds to defendants Tankel and Toll, to their damage.

19. Defendants Tankel and Toll are entitled to recover damages from plaintiff determined by computing the interest obligation incurred by defendants Tankel and Toll at a rate of ten per cent per annum on $75,000 and deducting therefrom all interest actually earned on said $75,000 for the period of April 20, 1970 to date of judgment herein.

20. Defendant Jordan is entitled to recover reasonable attorneys fees in connection with his defense of plaintiff's claim for specific performance of the escrow agreement pursuant to the provisions of paragraph 6 of Joint Exhibit 1.

21. Defendants shall recover their costs of suit incurred herein.

DATED: November 29, 1973.

/s/ Lawrence T. Lydick
Lawrence T. Lydick
United States District Judge

APPENDIX 2.

Memorandum.

United States Court of Appeals, for the Ninth Circuit.

Phillip Purer, Plaintiff-Appellant, vs. David E. Jordan, Frederic B. Tankel and Arthur Toll, Defendants-Appellees. No. 74-1829.

Appeal from the United States District Court for the Central District of California.

Filed: Sept. 7, 1976.

BEFORE: DUNIWAY, CARTER and TRASK, Circuit Judges.

Appellant Purer appeals from the judgment of the district court awarding appellees, Jordan, Tankel, and Toll, certain monies that were formerly deposited in escrow plus interest that had accrued. This action stemmed from a proposed sale of certain unregistered securities of VTR, Inc. (VTR).

In 1969, Purer and Jordan entered into an agreement for the sale to Jordan of 100,000 shares of VTR stock owned by Purer. The agreement was later amended apparently to involve only 50,000 shares. This stock was not registered either under the Securities Act of 1933, 15 U.S.C. § 77f, or the California securities laws. Pursuant to the agreement, Jordan with the financial assistance of his nominees, Tankel and Toll, deposited $75,000 in escrow. The escrow agreement provided that escrow would close 10 days after a registration statement of VTR stock that had been submitted to the Securities and Exchange Commission (SEC) became effective. However, in November 1969, trading was suspended in VTR stock by the SEC for certain untrue public statements made by a VTR

officer. Then, in January 1970, VTR's board of directors, which included Purer, withdrew the registration statement before it became effective. Appellees thereafter requested the termination of the escrow and the return of the $75,000. Purer notified the escrow agent of his opposition to the appellees' request and then commenced this suit.

Purer sought enforcement of the contract and damages. Appellees answered and raised certain defenses to enforcement of the contract, as well as asserting a counterclaim for the money deposited in escrow including interest. The district court ruled in favor of the appellees' counterclaim and against Purer's action and also awarded attorney's fees to Jordan in accordance with the terms of the contract. This appeal ensued.

Jurisdiction in the district court was asserted by appellant Purer under the Securities and Exchange Act of 1934, 15 U.S.C. § 78aa; 28 U.S.C. § 1331 (federal question); 28 U.S.C. § 1337 (Commerce Clause); and "the common law of California." Jurisdiction was not challenged, and we find that it exists pursuant to 15 U.S.C. § 78aa. The jurisdiction of the district court to hear the counterclaim of appellees was also not challenged, but we find here that it falls under 15 U.S.C. §§ 77v, 78aa.

Purer seeks a remedy for damages under SEC Rule 10b-5, 17 C.F.R. § 240.10b-5, and its statutory counterpart, section 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78j(b). He alleges that appellees used fraud in connection with the sale in that they never intended to perform their contractual obligations under the agreement. As the district court found, however, Purer failed to prove that the appellees committed any fraud in this transaction. C.T. at 945-

50. Tankel and Toll raised $75,000 in one day, and they assert that they would have raised the entire sale price by the date for closing escrow. Their interest in VTR stock waned only after the SEC suspended trading and the registration statement was withdrawn.

Appellees Jordan, Tankel, and Toll raised a number of issues in support of their counterclaim, including substantial questions arising under the Securities Act of 1933, 15 U.S.C. § 77*l*, and the Securities and Exchange Act of 1934, 15 U.S.C. § 78j, as well as under the California securities laws. However, because the basic principles of California contract law resolve this dispute in favor of the counterclaim, we need not consider the question involving the securities laws.[1]

Initially, we agree with the district court that Purer failed to comply with certain conditions of the escrow agreement that had been agreed upon. One of the express conditions of the agreement to be performed by Purer was the deposit in escrow of an instrument signed by a principal officer of VTR acknowledging the sale of the stock from Purer to Jordan; this obligation was never accomplished. A more important and express condition was the registration of VTR stock, as the closing date of escrow was established at 10 days after the effective date of the registration statement that had been submitted to the SEC. Since unregistered stock would be less valuable to the appellees, who apparently were purchasing the stock with an eye for

---

[1]Of course, where there are two grounds in support of a cause of action, one federal and one nonfederal, it is well-recognized that a federal court has power to retain and dispose of the action on the nonfederal ground without even reaching the federal ground. United Mine Workers v. Gibbs, 383 U.S. 715 (1966); Hurn v. Oursler, 289 U.S. 238, 246 (1933); Siler v. Louisville & Nashville R.R., 213 U.S. 175, 191 (1909).

resale, the effectiveness of the registration statement was made a condition precedent to closing of the escrow. However, the board of directors of VTR, with Purer in attendance as a board member, unanimously decided to withdraw the registration statement. As a result, appellees' bargained-for registration of VTR stock as a precondition to the close of escrow was never obtained.

Therefore, the conditions of the escrow agreement were not complied with, as they were required to be. *See, e.g., Love v. White,* 56 Cal. 2d 192, 194, 363 P.2d 482, 484, 14 Cal. Rptr. 442, 444 (1961); *Los Angeles City High School District v. Quinn,* 195 Cal. 377, 383, 234 P. 313, 315 (1925); 18 Cal. Jur. 2d Rev., *Escrows* § 28, at 356 (2d ed. 1969). As the district court ordered, when there is a failure of performance in escrow, money deposited therein is returnable to the depositors. *Groves v. Prickett,* 420 F.2d 1119, 1125 (9th Cir. 1970); *Crooks v. State Bar,* 3 Cal. 3d 346, 357, 475 P.2d 872, 880, 90 Cal. Rptr. 600, 608 (1970); 18 Cal. Jur. 2d Rev., *supra,* § 37, at 371.

The district court, in the alternative, also found that the contract between Purer and Jordan was a mere option and not a firm contract of sale. That the parties intended to make only an option is clear from the following language of an amendment to the escrow agreement:

> "Jordan or nominee may, *at his option,* purchase 50,000 of the 100,000 shares of VTR stock which

> are the subject of this escrow, which said shares shall be registerable and which said 50,000 shares, *if elected to be purchased,* shall be purchased as a unit at and for a total purchase price of $525,000 net cash to Purer." (Emphasis added.)

This interpretation of the agreement is further bolstered by the additional wording that:

> "Failure of Jordan or nominee to purchase any or all of said shares on or before the extended closing date (as hereinafter set forth) shall be without liability to either party except that Jordan shall bear all costs of escrow."

Purer, however, argues that even assuming that an option existed, the option only applied to 50,000 of the total of 100,000 shares originally placed in escrow, with the remaining shares subject to a firm contract of sale. This contention is not consistent with Purer's prior views. Purer himself alleged in his complaint that the agreement had been amended to involve "only" 50,000 shares of VTR stock at a purchase price of $525,000. C.T. at 26. Furthermore, prior to this action, Purer's attorney had demanded of appellees only $525,-000—the price of the 50,000 optioned shares. Nevertheless, even if we accept Purer's contention, the other 50,000 shares were not part of an enforceable contract as certain conditions of the escrow agreement were not performed by Purer. See discussion *supra.*

In addition, Purer maintains that if in fact an option existed, the $75,000 paid into escrow constituted consideration for the option in order to make it irrevocable,

and thus the $75,000 would belong to Purer. However, the $75,000 appears to be merely earnest money placed in escrow to establish appellees' good faith in the transaction. For instance, the option clause was added as an amendment on October 18, 1969, while the agreement to deposit the money in escrow was not subscribed to by the parties until October 30, 1969. Thus, it would not appear that the money deposited in escrow constituted a quid pro quo for the option.

For the foregoing reasons, the judgment of the district court should be affirmed.

APPENDIX 3.

Order.

United States Court of Appeals, for the Ninth Circuit.

Phillip Purer, Plaintiff-Appellant, vs. David E. Jordan, Frederic B. Tankel and Arthur Toll, Defendants-Appellees. No. 74-1829.

Filed: Nov. 1, 1976.

Before: DUNIWAY, CARTER and TRASK, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Duniway and Trask have voted to reject the suggestion for a rehearing en banc. Judge Carter recommends against a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.